Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-303

DAVID and MARY KINEE, et al.,
Petitioners,

v.

ABRAHAM LINCOLN FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, David and Mary Kinee, et al., pray that a Writ of Certiorari issue to review the judgment orders of the United States Court of Appeals for the Third Circuit entered in the above case on July 19, 1974 and August 12, 1974.

OPINIONS BELOW.

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, printed in Appendix A1 is reported at 365 F. Supp. 975 (E. D. Pa. 1973). The Order of the District Court for the Eastern District of Pennsylvania of March 5, 1974 is printed as Appendix A18. The Order of the District Court for the Eastern District of Pennsylvania of March 29, 1974 is printed as Appendix A19. The Order of the District Court for the Eastern District of Pennsylvania dated April 25, 1974 is printed as Appendix A20. The Order of the Court of Appeals for the Third Circuit dated July 19, 1974 is attached hereto as Appendix A22. The Order of the United States Court of Appeals for the Third Circuit dated August 12, 1974 is attached hereto as Appendix A24.

JURISDICTION.

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on July 19, 1974, dismissing appellant's appeal. A petition for reconsideration by the court in banc was denied on August 12, 1974. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does Federal Rule of Civil Procedure 11 bestow the District Court with unbridled power; a power immune from the fundamental safeguards that only the right to appeal can insure?

2. Is not the spirit of the federal and appellate rules violated by dismissal of meritorious claims on the basis of procedural technicalities?

FEDERAL RULES INVOLVED.

Federal Rule of Civil Procedure 11 (Appendix A27); Federal Rule of Appellate Procedure 3 (Appendix A25).

STATEMENT OF THE CASE.

The named plaintiffs, suing on behalf of a class, sued approximately 177 mortgage institutions in the Philadelphia area. Jurisdiction was predicated upon violation of various federal anti-trust laws. *Pursuant to agreements between counsel,* various defendants were dismissed with prejudice from the action by the District Court by orders of January 15, March 8, and June 7, 1973.[1]

The District Court, sua sponte, scheduled a hearing to inquire into a possible violation of the Federal Rules of Civil Procedure 11 by counsel for plaintiff in having sued these defendants without justification.[2]

By order of September 27, 1973, the District Court held that the plaintiffs' attorneys had acted in violation of Rule 11 and invited counsel for the dismissed defendants to submit bills for their attorneys' fees. Based on the bills submitted, the court entered its order of March 5, 1974 requiring counsel for plaintiffs to pay attorneys' fees to counsel for the dismissed defendants.

Plaintiff filed a motion for reconsideration requesting the court to vacate its order of March 5, 1974 and seeking the court to make specific findings of fact.[3]

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1. No conditions were imposed in the orders dismissing the defendants. The reasons for the dismissals are not of record.

2. During this hearing of March 8, 1973, the court instructed counsel for the plaintiffs to return to their offices and bring to court those documents upon which they in good faith relied in framing the allegations of the complaint. A recess was held at the hearing to enable counsel to comply with the court's request. Upon returning to the court after the recess, the District Court adjourned the hearing and advised that it did not wish to see the documents at that time and would pursue the inquiry at a later date. No further hearings were held.

3. The bills which were the basis for the court's order of March 5, 1974 had never been entered of record. The District Court in an ex parte letter to counsel for defendants had requested that affidavits

The motion for reconsideration was denied by the District Court by order of March 29, 1974.[4]

On April 2, 1974 plaintiffs-appellants, through their attorneys, appealed the District Court's order of March 5, 1974, together with the court's denial of plaintiff's motion for reconsideration. Plaintiffs' appeal was timely filed, and the Court of Appeals thus had jurisdiction over the action. Several appellees filed a motion to dismiss the appeal on the basis that the Court lacked jurisdiction in that counsel, rather than plaintiffs below, were the aggrieved and proper party on appeal. On July 19, 1974, the Court of Appeals for the Third Circuit granted the motion to dismiss, not only against the moving appellees, but as against all appellees. Plaintiffs then petitioned for reconsideration by a court in banc, in which they asked that the order of July 19, 1974 be vacated, and the case determined on the merits, or in the alternative, that the order be vacated and Messrs. Freedman, Borowsky and Lorry be permitted to intervene as parties and amend the notice of appeal to designate and substitute themselves as appellants. The petition for reconsideration was denied on August 12, 1974.

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3. (Cont'd.)
be filed in support of the bills submitted. The affidavits had never been entered of record. Counsel for plaintiffs in their motion for reconsideration requested that the bills and affidavits be entered of record and that counsel for plaintiffs be entitled to discover the basis for the bills, especially the basis for the tremendous disparity between the bills for similar services. The requested relief was denied by the District Court.

4. After the record was closed, the District Court filed the bills and affidavits submitted, several of which were sealed by the court in an envelope. These materials were submitted under seal for reasons of some unexplained confidentiality, and counsel for plaintiffs have been denied the right to see the affidavits. A motion to break the seal was filed with the District Court, but denied. Important questions of due process of law have been raised by the enumerated events.

REASONS FOR GRANTING THE WRIT.

I. Does Federal Rule of Civil Procedure 11 Bestow the District Court With Unbridled Power; a Power Immune From the Fundamental Safeguards That Only the Right to Appeal Can Insure?

Federal Rule of Civil Procedure 11 provides:

> "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

Rule 11 delineates no procedures. Nowhere in the Federal Rules of Civil or Appellate Procedure are the

mechanics or remedies outlined for imposition of sanctions pursuant to Rule 11. Rule 11 readily lends itself to a paradoxical situation for which the Federal Rules afford no guidelines.

In civil cases, Rule 11 permits discipline of counsel through the imposition of fines, though they be denominated costs or counsel fees. Rule 11 does not provide for an ancillary proceeding under separate caption. Rather, it is implicit in Rule 11 that the order imposing sanctions be styled in the caption of the action before it. The paradox engendered is that the party is not aggrieved and the aggrieved is not a party.

Is appellate review to be abrogated because there is no "aggrieved party"? In the absence of a rule clearly defining the appropriate procedure to pursue, can an appellate court punish an unwary litigant for taking the wrong road at an unmarked fork? The order appealed from, the allegations of error, the nature of the alleged injustice, and the identity of the aggrieved were clear. Only the path to follow was ambiguous. That the defendants were not prejudiced is unmistakable; the majority of the defendants who emerged victorious did not even join in the fray.[5] The Court's refusal to permit intervention and substitution was improper and without basis. A formal motion was unnecessary. *Smart v. Coca Cola Bottling Corp.*, 337 F. 2d 950 (6th Cir. 1964).

II. Is Not the Spirit of the Federal and Appellate Rules Violated by Dismissal of Meritorious Claims on the Basis of Procedural Technicalities?

The spirit of the Federal Rules of Civil and Appellate Procedure is to dispense with technicalities which defeat the orderly disposition of grievances. In the instant case,

5. 6 of 23 attorneys awarded fees joined in the motion.

a meritorious appeal was timely filed, conferring jurisdiction on the Court of Appeals. According to Rule 3(a) of the Federal Rules of Appellate Procedure no other irregularity but timely filing affects the validity of an appeal:

> "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . ."

The strict filing requirement responds to the congressional mandate of 28 U. S. C. § 2107, establishing a 30-day period after judgment for appeal filing.

> "The basic rationale for insistence upon timely filing is the necessity for providing a precisely ascertainable point of time at which litigation comes to an end."

Files v. City of Rockford, 440 F. 2d 811, 814 (7th Cir. 1971). Therefore, except to extend the time for filing a notice of appeal, the court should be liberal in its construction of notices of appeal.

In determining whether a procedural error is harmless or is of a nature which should be disregarded, the courts have taken into consideration several factors including the sufficiency of notice to the appellees of the nature of the appeal, the possibility of prejudice to the appellee, and the character of the errors constituting "mere technicality". In *Gajewski v. Stevens*, 340 F. 2d 1000, 1002 (8th Cir. 1965), the court held:

> "Notices of appeal are entitled to a liberal construction where the intent of the party taking the appeal is apparent and the adverse party is not prejudiced."

In *Jones v. Chaney and James Construction Co.*, 399 F. 2d 84, 86 (5th Cir. 1968), the court states:

> "The notice of appeal, however, should not be used as a 'trap for the unwary draftsman', Wright Federal Court, § 104 at 406 (1963); and decision on the merit should not be avoided on the basis of mere technicalities."[6]

In *Foman v. Davis*, 371 U. S. 178 (1962), the District Court entered judgment on December 19, 1960 dismissing petitioner's complaint. On December 20, 1960, petitioner filed a motion to vacate the judgment and amend the complaint. On January 17, 1961 petitioner filed the notice on appeal on the judgment of December 19, 1960. On January 23, 1961, the District Court denied petitioners' motion to vacate the judgment and amend the complaint. On January 26, 1961, petitioner filed the notice of appeal for the denial of the motion.

The Court of Appeals dismissed the appeal insofar as taken from the judgment of December 19, 1960 on the ground that the notice of appeal could not be perfected during the pendency of a motion for reconsideration. The Court of Appeals only considered the appeal from the order of January 23, 1961 denying petitioner's motion to

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6. Signature on the notice of appeal by counsel on behalf of plaintiffs in lieu of by counsel in their own right did not raise a jurisdictional impediment; and anything less than such an obstacle should clearly not be treated as fatal. The Court of Appeals for the Third Circuit in *Lindy Bros. Bldrs., Inc. of Phila. v. American R. & S. San Corp.*, 487 F. 2d 161 (3rd Cir. 1973) made this apparent. In that case, the defendants below appealed the award in an antitrust case of attorney's fees and expenses to plaintiffs' counsel. The attorneys awarded fees had filed a petition in the District Court "for fees in their own name and no request for contribution was made on behalf of the named appellees." 487 F. 2d at 163, n. 1. The plaintiffs below and not counsel who had petitioned for and been awarded fees, were the named appellees. Notwithstanding, this Court, noticing the irregularity, proceeded to review the case on the merits. Were such an irregularity a jurisdictional impediment, this court would have had no alternative but to dismiss the appeal on its own motion. *Armstrong v. United States*, 283 F. 2d 122 (3rd Cir. 1960).

vacate judgment and amend the complaint. The Court of Appeals refused to review the District Court's order of December 19, 1960 for the reason that the only perfected notice of appeal, which had been filed on January 26, 1961, did not specify the judgment of December 19, 1960.

The Supreme Court reversed, stating:

> "The defect in the second notice of appeal did not mislead or prejudice the respondent . . . taking the two notices and appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. . . . It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive of the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson*, 355 U. S. 41, 48 L. ed. 2d 80, 86, 78 S. Ct. 99. The Rules themselves provide that they are to be construed 'to secure the just, speedy and inexpensive determination of every action.' Rule 1." 371 U. S. at 181-82.

Technical irregularities have repeatedly been overlooked when only one notice of appeal was filed and that notice referred to the wrong order or judgment. *Lecklikner v. Transandina Compania Naviera, S. A.*, 390 F. 2d 179, n. 1 (3rd Cir. 1968); *Livergood v. S. J. Groves & Sons*, 361 F. 2d 269 (3rd Cir. 1966); *Jackman v. Military Publications, Inc.*, 350 F. 2d 383 (3rd Cir. 1965); *Crowling v. Pittsburgh and Lake Erie Railroad Co.*, 327 F. 2d 142, N. 1 (3rd Cir. 1963); *United States v. Certain Land and City of Patterson, New Jersey*, 322 F. 2d 866, 869 ("Where it is clear that a

party has simply made an inartificial attempt to obtain review of a prior judgment or order, courts have accepted the appeal under the doctrine of harmless error . . . .''). Adherence to technicalities should not be sanctioned where all that can attain is injustice and the taxation of judicial machinery, in this instance, by forcing plaintiffs to pursue their remedy by extraordinary writ.

CONCLUSION.

Wherefore, it is respectfully requested that this Court reverse the Order of the United States Court of Appeals for the Third Circuit in order to permit plaintiffs below to prosecute the appeal from the judgment of the United States District Court for the Eastern District of Pennsylvania, or permit counsel to intervene and prosecute the said appeal.

It is respectfully submitted that the issues herein are of the greatest significance with respect to appellate practice, and must be considered and resolved by this Court in order to prevent a perpetuation of the decisions below.

Respectfully submitted,

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Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-2269.

DAVID AND MARY KINEE, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF A CLASS OF BORROWERS SIMILARLY SITUATED, ET AL.

v.

ABRAHAM LINCOLN FEDERAL SAVINGS & LOAN ASSN., ET AL.

MEMORANDUM AND ORDER.

September 27, 1973

NEWCOMER, *J.*

Currently before this Court are a number of Rule 12 motions which raise an even larger number of problems. The Court will attempt to summarize the history of this litigation sufficiently that the reader may make intelligent sense of what follows, and then will deal with the issues, not so much in the logical order of their importance to the case, as in their order of difficulty, starting with the easiest first.

The individual plaintiffs in this case are five husband and wife couples. Plaintiffs David and Mary Kinee obtained a mortgage from defendant Colonial Mortgage Service Company. The other four couples named as individual plaintiffs similarly obtained mortgages from four of the named defendants. Each plaintiff couple obtained only one mortgage from one named defendant. On November 16, 1972, suit was instituted against 177 named defendants by the five named plaintiff couples in their own right and on behalf of all those similarly situated.[1] The suit complains that the defendants, as writers of mortgages, required plaintiffs, as part of their mortgage agreements, to prepay, in monthly installments, a sum equal to one-twelfth the annual expected property tax, mortgage insurance premiums, sewer and water rentals, and other possible liabilities which, if not paid, might result in a lien on the mortgage property with higher priority than the lien held by the mortgagor. The essence of the complained-of practice as nearly as the Court can determine, is that the lending institutions pay no interest on the monies thus obtained even though they use the monies for their own investment purposes and obtain a return on those monies. Plaintiffs have proposed a number of theories as to why the failure to pay interest on the monies thus obtained is an actionable wrong in and of itself. They also allege that, even if the failure to pay interest is not in and of itself illegal, the defendants have conspired together to eliminate the alternative practice of paying interest on such deposits, a variation in the terms of the mortgage which is advantageous to borrowers, and a term upon which there might be some competition among lenders expected, and that in conspiring to eliminate competition as to this term

1. Forty-six defendants have been voluntarily dismissed to date, leaving 131 defendants as of this writing.

in the mortgage, have violated the anti-trust laws. They also allege that the requirement of the acceptance of the prepayment agreement as a condition of obtaining a mortgage constitutes an illegal tie-in under Section 1 of the Sherman Act.

To jump right into the heart of this affray, plaintiffs urge as one ground for the positive illegality of the actions of defendants that the actions of the defendants violate 15 U. S. C. § 1601 et seq., popularly known as the Truth-in-Lending Act. However, the practices of which defendant complains have been expressly eliminated from the operation of the Truth-in-Lending Act by various provisions of that Act and regulations promulgated pursuant thereto. It is not necessary to go into a detailed analysis of this exemption in this memorandum, as such an analysis has already been done in *Starrides v. Mellon National Bank and Trust Co.*, 353 F. Supp. 1072, (W. D. Pa. 1973). See also, *Graybeal v. American Savings and Loan Association*, 1973 CCH Trade Cases, ¶ 74, 469 (D. Columbia, April 24, 1973); *Umdenstock v. American Mortgage and Investment Company*, No. Civil-72-673 (W. D. Okla. April 17, 1973); and *Williams v. American Savings Association*, No. C. A.-3-6350-D (N. D. Tex. March 26, 1973). The Court finds itself in complete agreement with the rationale of these cases, and accordingly plaintiffs' claims under the Truth-in-Lending Act will be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Plaintiffs' so-called "fifth cause of action" alleges that, when the complained of actions are undertaken by "a savings and loan association" those actions violate the Homeowners Loan Act of 1933, 12 U. S. C. § 1461 et seq. The plaintiffs have failed to enlighten the Court as to which Section of the Homeowners Loan Act is violated by the

complained-of actions, and as to the theory by which the complained-of actions violate that Act. First, it is obvious that the actions of the state chartered "savings and loan associations" are not subject to the Homeowners Loan Act, and therefore cannot be in violation of it. Therefore, as to the state chartered savings and loan association defendants, the fifth cause of action for a violation of the Homeowners Loan Act of 1933 must be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

As to the federally chartered savings and loan associations, it is not immediately apparent on the face of the pleadings, or of the briefs filed in opposition to the motions to dismiss, how the actions of the federal savings and loan associations violate the Homeowners Loan Act. On the other hand, the defendant federal savings and loan associations have argued quite persuasively that the complained of course of action is specifically authorized by the regulations of the Home Loan Bank Board, the administrative agency charged with regulating federally chartered savings and loan associations under the Homeowners Loan Act of 1933. The regulations cited by the defendants do indeed appear to authorize the complained of practice. Plaintiffs only attack on the existence of this authorization rests on such a strained interpretation of the word "distribute" as used in 12 C. F. R. ¶ 544(1)(a)(1) and (b)(10) that the Court has concluded that it is wholly without merit. Even if this Court were to conclude that the regulations did not specifically authorize the practice complained of, the defendants would still be in the position of never having brought to the Court's attention any provision of the Homeowners Loan Act or of the regulations promulgated pursuant thereto which forbid the practice and therefore might arguably create a cause of action for following the practice.

However, it is not necessary for the Court to involve itself in this question, as the Court is convinced that the practice followed by the federally chartered savings and loan associations is specifically authorized by the regulations of the Home Loan Bank Board, and that therefore plaintiffs' fifth cause of action as it applies to federally chartered savings and loan associations alleging that the complained-of practices are in violation of the Homeowners Loan Act of 1933 must be dismissed pursuant to F. R. C. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

The only two remaining theories of the plaintiffs by which the per se legality of the complained-of practices is attacked are based on state law. One of the counts, or both, seem to be based on, or at least include, some theory of unjust enrichment. This latter claim, on nearly identical facts, has recently been dealt with by a Pennsylvania Court, which concluded that such a claim failed to set forth a cause of action against the defendants. *Buchanan v. Brentwood Federal Savings and Loan Association*, No. 2781 January 1972 Term (Pa. C. P. Allegheny Co., March 6, 1973). This may be some indication of which way the wind is blowing in the state courts concerning plaintiffs' third and fourth causes of action. However, until the Supreme Court of the State of Pennsylvania has spoken on these issues, the law of Pennsylvania relating thereto must be taken as an open and unsettled issue. With the dismissal of plaintiffs' second and fifth causes of action, the per se illegality of the complained-of actions is no longer before the Court on any federal ground. If this Court were to find that it had pendant jurisdiction over the plaintiffs' state law claims, and then to exercise such jurisdiction to decide those claims in advance of the Supreme Court of Pennsylvania, it would in effect be providing an advisory opinion on what it believed the state law of Pennsylvania should be, although

this is usually framed in the politer terms of putting forth what the deciding court thinks that the Supreme Court of Pennsylvania would decide. In a diversity case, with independent federal jurisdiction, this circumstance cannot always be avoided, but it is a legitimate consideration in deciding whether or not to exercise pendant jurisdiction. For as the Supreme Court of the United States said in *United Mineworkers v. Gibbs*, 383 U. S. 715 (1966) at 726,

> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendant jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to the litigants; if these are not present the federal court should hesitate to exercise jurisdiction over state claims even though bound to apply state law to them, (citations omitted). Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a sure-footed reading of the applicable law."

The plaintiffs in this case have filed an action in state court against the defendants in this case on the state grounds. In that action they will indeed get a sure-footed reading of the state law. Further, the dismissal of the federal causes of action which called into question directly the *per se* legality of the complained of actions makes it questionable whether the federal cause of action which remains in the case and the state causes of action contained in plaintiffs' third and fourth causes of action contain sufficiently similar factual and legal issues that considerations of judicial economy, convenience, and fairness to the litigants militate for the exercise by this Court of pendant

jurisdiction at all. In *Stavrides*, supra, the Court found insufficient similarity to justify exercise of pendant jurisdiction on similar facts, and with that decision we must agree. This Court does not choose to exercise pendant jurisdiction over the causes of action stated in plaintiffs' "third cause of action" and plaintiffs' "fourth cause of action", and accordingly they will be dismissed without prejudice.

We now turn to the last remaining "cause of action" which plaintiffs assert. This alleges claims under Section 4 of the Clayton Act, 15 U. S. C. 15, for violations of Sections 1, 2, and 3 of the Sherman Act and Sections 3, 15, and 26 of the Clayton Act, but in fact the allegations make out only two alleged violations, one for a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, 15 U. S. C. 1, and the other for the imposition of a contract in restraint of trade, to wit, one containing an unlawful tie-in arrangement, under the same Section. Here the plaintiffs have the upper-hand, for the time being at any rate. The plaintiffs came dangerously close, however, to losing this upper-hand through sloppy pleading. Paragraph 24 of the complaint reads:

> "Beginning sometime in the 1960's, the exact date being unknown to the plaintiffs, and continuing up to and including the date of filing of this Complaint, the defendants, together with certain co-conspirators presently unknown to plaintiffs and members of the class they represent, have engaged in this unlawful combination and conspiracy in unreasonable restraint of interstate trade and commerce; an unlawful combination and conspiracy to monopolize interstate trade and commerce and an unlawful combination and conspiracy in restraint of trade and commerce in violation of Sections 1, 2, and 3 of the Sherman Act, and Sections 3, 4, 15 and 26 of the Clayton Act."

Paragraph 25 of the complaint reads:

> "The substantial terms of the aforesaid violations are that defendants with concerted action changed from the practice of deducting payments for taxes, assessments and insurance from borrowers' principal debt balance to the 'escrow' practice with knowledge that other defendants, co-conspirators and lending institutions had made such a change or were intending to make such a change, and in reliance upon such changes and intentions and as a result of consultations with respect to such changes and intentions with other defendants, co-conspirators and lending institutions."

Now it is true that paragraph 25 of the complaint makes it appear that plaintiffs' theory of a conspiracy in restraint of trade is bottomed on their being able to show that all of the defendants changed from the principal debt balance method to the escrow method as a result of the conspiracy, i.e. that all of the defendants at one time used the principal debt balance method, and that as a result of some meeting of the minds, they all decided to change to the escrow practice. The defendants have jumped upon this formulation of plaintiffs' theory with a zest that would have done credit to any common law pleader. They have also responded with one of the more complex versions of a negative pregnant that it has ever been this Court's privilege to see.

Essentially, the argument of the defendants is that, since they can establish beyond peradventure that some of the members of the alleged set of conspirators have used the escrow practice from time immemorial, that the plaintiffs' complaint fails to allege a cause of action. The plaintiffs have responded in their briefs with a very plausible theory to rehabilitate their pleading. The essence of their

complaint, they say, is not necessarily that all defendants at one time used the principal debt balance method, but that the reason that the principal debt balance method became a scarce commodity in the mortgage market, and was all but eliminated as a point upon which mortgage lenders competed, was as a result of conspiracy between mortgage lenders to eliminate the principal debt balance method and to move from that to the escrow method. On this theory, it is irrelevant whether some individuals who are defendants in this case have always used the escrow method as long as, as a result of combined and conspiratorial action, other mortgage lenders came to adopt the escrow method as more advantageous to them and as a mortgage condition concerning which there would be no competition.

While it is true that the exact language of paragraph 25 of the complaint appears to require, if the probata are to be exactly matched with the allegata, that all the defendants in conspiracy changed from the principal debt balance method to the escrow method, this Court is inclined to take the tenor of paragraphs 24 and 25 read together to allow the proof of any illegal conspiracy including some or all of the defendants, having to do with the disappearance of or a substantial reduction of the availability of the principal debt balance method of accounting for tax, assessment, and insurance payments from the market as a condition concerning which there was substantial competition. If such a conspiracy and such a practice were established, it would be a violation of the anti-trust laws.

Read thus broadly, in what the Court considers a reasonable effort to avoid useless amendments to the pleadings, which might lead to an old time pleading war, the conspiracy theory states a claim upon which relief might be granted. Defendants have claimed that the complaint alleges only "conscious parallelism" which is not an anti-

trust violation. They are, in the Court's opinion, mistaken. The complaint alleges parallel behavior and also alleges a shift from divergent to parallel behavior. The complaint claims these to be the product of a conspiracy. While the facts are only circumstantial, and may also be consistent with non-conspiratorial behavior, they save the complaint from being a "bare bones" pleading merely adopting the language of the statute, and put defendants on proper notice concerning what is being complained of. Whether plaintiffs can prove what they allege is a wholly different question.

The defendants have combined their motions to dismiss for failure to state a claim under Rule 12(b)(6) with stacks of affidavits and other materials purporting to show that this or that fact involved in the allegations of plaintiffs' anti-trust counts are untrue. The Court could choose to consider these proffered extraneous sources of information on a 12(b)(6) motion, pursuant to the provisions of the last sentence of Rule 12(b)(6), by considering the motions under 12(b)(6) as Rule 56 motions for summary judgment. Even if the Court were to do this, however, the motions for summary judgment would have to be denied at this point in the case. The discovery proceedings in this case have been stayed by order of the Court pending the decision of the Court on Rule 12 motions. The plaintiffs have had no opportunity for discovery. The plaintiffs are in no position to meet the proofs beyond the record which have been proffered by the defendants. Further, much of the proof of the plaintiffs in their conspiracy allegations will be dependent upon material largely in the possession and knowledge of the defendants. To grant a motion for summary judgment under such circumstances would be patently unfair. Counsel for plaintiffs might gain much from a reading of 6 Moore's Federal Practice ¶ 56.15(5) relating to the proper consideration of access to proof in deciding whether or not to grant a motion for summary judgment. There-

fore, the Court has decided to exclude the matters proffered by the defendants which are outside the pleadings from its consideration at this time. It may be that when discovery is completed the defendants may be entitled to their sum-summary judgment but consideration of that issue will necessarily have to be postponed until that time.

A few other considerations require comment. While the plaintiffs' allegation that the escrow arrangement and the mortgage loans constitute separate products and are an illegal tie-in arrangement under the anti-trust laws seems a little strained, this Court thinks it better practice to allow the completion of discovery before ruling on the separateness of those economic entities. Furthermore, the defendants have, pursuant to Rule 12(b)(1), challenged the Court's jurisdiction under the anti-trust laws by claiming that the business of writing mortgages is local in nature and that the required impact on inter-state commerce has not been shown. In this regard, the Court observes that many of the institutions named as defendants write mortgages in places other than Pennsylvania, and further that the magnitude of the mortgage business in Eastern Pennsylvania must necessarily have impact on inter-state commerce. The Court is simply not persuaded that a conspiracy of the economic magnitude of the one alleged can possibly be sufficiently local in its impact as to escape the scrutiny of the federal anti-trust laws.

Further, the federally chartered savings and loan associations claim that, since they are authorized to perform the complained of acts by the regulations of the Federal Home Loan Bank Board, that they are exempt therefore from the operation of the anti-trust laws. However, they concede that Congress never specifically exempted federally-chartered savings and loan associations from the operation of the anti-trust laws. They merely claim that the regula-

tions of the Federal Home Loan Bank Board, properly followed, "occupy the field", and that a violation of the anti-trust laws cannot be made out when those regulations are followed. The mistake in this reasoning is that the regulations of the Home Loan Bank Board do not require that interest not be paid on monies taken in under the escrow arrangements, they merely authorize the practice of not paying such interest. Presumably, it would be perfectly legal for federal savings and loan associations to pay such interest, and if competition demanded it, such interest would probably be paid by them. While the federal savings and loan associations could not be sued for the practice in and of itself, if they have joined a conspiracy to restrain competition by making the practice the only practice in the face of other competitive alternatives, nothing in the law which has been brought to the attention of this Court would exempt them from liability under the anti-trust laws for joining a combination and conspiracy in restraint of trade. Therefore, the separate motion of the federal savings and loan associations for dismissal pursuant to Rule 12(b)(6) of the anti-trust count will be denied, insofar as it applies to the conspiracy charge, but will be granted insofar as it applies to the illegal tie-in charge.

The defendants have moved to strike plaintiffs' complaint, or in the alternative, various paragraphs thereof, under Rule 12(f) for being redundant, immaterial, impertinent, or scandalous.

The first ground for this motion is that some of the allegations are "patently untrue" and therefore impertinent and scandalous. Needless to say, this is not a proper 12(f) ground, and verges on impertinence itself.

The second ground complains of redundancy and immateriality. Some latitude must be given pleaders in complex cases. The complaint could have been better, but the

defendants have not been prejudiced by its form. This Court will not undertake to reform the complaint technically and minutely, aside from the clarification of ¶ 24 and 25 set out above. Defendants' 12(f) motions are denied.

The Federal National Mortgage Association was sued on the theory of a violation of the Truth-in-Lending Act only. Since all theories relating to violations of the Truth-in-Lending Act have been dismissed, the Federal National Mortgage Association will be dismissed from the case as a party defendant.

One last circumstance deserves discussion. The defendants have alleged that the plaintiffs' attorneys violated Rule 11 when they filed this complaint. This Court has concluded that in making the general allegations concerning an anti-trust violation by lenders who currently practice the "escrow" method of collecting tax prepayments, etc. there was sufficient information available that no violation of Rule 11 has been made out. This Court cannot say that a general knowledge of parallel behavior, coupled with a change from non-parallel to parallel behavior, is not sufficiently indicative of a conspiracy to support a good faith allegation thereof. However, the method by which the plaintiffs' attorneys chose to discover which lending institutions in the Eastern District practiced the escrow method, and thereby were proper subjects of suit, was, in the opinion of this Court, improper, and they are to be censured for adopting it. What they did was to take the Philadelphia phone book, and to sue every individual or lending institution listed in the Philadelphia phone book under the heading of mortgage brokers or related headings. More than one-fourth of the parties thus sued have been dismissed from the case because they do not practice the escrow method, and therefore are not even arguably proper parties. The plaintiffs' attorneys set out a dragnet. Having put a

large number of parties to the inconvenience, expense and possible anxiety of being sued, they then were able conveniently to separate the wheat from the chaff without great effort. They chose to inconvenience a large number of parties rather than inconvenience themselves with proper investigation as to who the proper parties would be. When they signed their pleading, they could not say that they in fact had reasonable basis to believe that the allegations were true as to each defendant, but merely that there was within the aggregate mass of the defendants sued, a significant number of defendants, exact identities unknown, to which the allegations applied, together with an unknown number to which the allegations did not apply. This is simply not a proper way to proceed in federal court, or in any court for that matter. It is an abuse of process to use the issuance of a complaint to discover which of a number of parties is the proper party to be sued. If the plaintiffs had attempted reasonable investigation, and if some of the lending institutions who were not proper parties had not cooperated in that investigation, then perhaps they would have been justified in undertaking the course of action which they undertook. But under the circumstances of this case, the course of action which they chose was grossly improper.

The remaining defendants have attempted to make hay from the misdeeds of plaintiffs' attorneys, claiming that a violation of Rule 11 must necessarily end in the dismissal of the complaint. The Court is not persuaded by their argument. It is not the remaining defendants, the parties who would have been sued had the plaintiffs' attorneys undertaken proper investigation in the first place, who have been prejudiced by the misdeeds of plaintiffs' attorneys. It would not be in the interests of justice to dismiss this case with prejudice prior to an adjudication, nor would it really be in the interest of the remaining defendant banks,

since some other borrower would be free to bring the same suit on the same basis even if the named plaintiffs were estopped. It is inconceivable that a class could be bound by a dismissal on the merits for a violation of Rule 11. To dismiss the case without prejudice, however, would be a futile act because we would simply face a refiling, together with the service of the complaint on 131 party defendants, and a videotape replay of the proceedings in this action to date. Indeed, the Court has not been impressed with the misplaced vigor with which the remaining non-prejudiced defendants have pressed for a general dismissal on the basis of Rule 11, thereby obscuring the rights of those actually injured by the conduct of defendants' attorneys, that is, those defendants who were wrongfully sued and who have been dismissed. In protection of the rights of those parties, this Court will order attorneys for the plaintiffs to supply the Court with a list of the 46 parties heretofore dismissed voluntarily, together with the counsel who represented those parties while they were still on the record of this proceeding. The Court will then notify the attorneys for those parties that they have a right to file with the Court a bill of costs for the expenses incurred by their respective clients in having been forced improperly to appear and to defend this suit. Those costs will then be taxed to the attorneys for the plaintiffs.

ORDER.

AND NOW, to wit, this 27th day of September, 1973, pursuant to defendants' motions under Rule 12(b)(6), plaintiffs' claims under their second cause of action and fifth cause of action are hereby DISMISSED for failure to state a claim upon which relief can be granted. The claims made in plaintiffs' third cause of action and fourth cause of action are hereby DISMISSED as improvidently brought in the Federal Court and as not being proper subjects for the exercise of pendant jurisdiction. Defendant Federal National Mortgage Association is DISMISSED from the case as a party defendant. Plaintiffs' anti-trust claim based upon the existence of an illegal tie-in is DISMISSED as to the federally chartered savings and loan associations. The remaining parts of all of defendants' outstanding Rule 12 motions are hereby DENIED. The Court does not choose to consider extraneous proofs pursuant to Rule 12(b)(6) and 56 at the present time, and any outstanding motion requesting relief in the nature of summary judgment is hereby DENIED as premature. All outstanding motions pursuant to Rule 11 are hereby DENIED, but counsel for plaintiffs is hereby directed to supply the Court with a list of the voluntarily dismissed defendants and their counsel, so that the Court may take the appropriate action more fully described in the above memorandum.

IT IS SO ORDERED.

CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 72-2269.

DAVID AND MARY KINEE, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF A CLASS OF BORROWERS SIMILARLY SITUATED, ET AL.

v.

ABRAHAM LINCOLN FEDERAL SAVINGS & LOAN ASSN., ET AL.

ORDER.

AND NOW, to wit, this 5th day of March, 1974, in accordance with the Court's Memorandum and Order of September 27, 1973, and because of a wilful violation of Rule 11 of the Federal Rules of Civil Procedure, the law firm of Freedman, Borowsky and Lorry is hereby directed to pay the following counsel fees to the firms designated and in the amounts indicated, the Court having determined that there is no just reason for delaying the entry of final judgment in this matter, and that a final judgment within the meaning of Rule 54(b) of the Federal Rules of Civil Procedure is now and the same is hereby directed to be entered.

Townsend, Elliott & Munson	$ 367.00
Harper, George, Buchanan & Driver	150.00
Ettinger, Poserina, Silverman, Dubin, Anapol & Sagot	350.00
Edward M. Snyder Associates	530.62
Clelland Leigh Mitchell, Esquire	1,109.31
Pepper, Hamilton & Scheetz	746.20
Bank and Minehart	500.00
A. Walling Levin, Esquire	250.00
Wollman, Tracey and Schlesinger	100.00
Dechert, Price & Rhoads	176.00
Peck, Young & VanSant	247.90
Banks and Banks	852.50
Goodis, Greenfield, Henry, Shaiman & Levin	1,514.00
Mesirov, Gelman, Jaffe & Levin	354.30
Philips, Curtin & DiGiacomo	325.00
LaBrum and Doak	1,080.84
Wolf, Block, Schorr and Solis-Cohen	2,101.02
Steinberg, Greenstein, Richman & Price	200.00
Morris Passon, Esquire	750.00
Simons, Kashkashian, Kellis & Groen	300.00
William J. Moses, Esquire	605.25
Schnader, Harrison, Segal & Lewis	2,725.21
Gold & Silverman	425.00

The Court has reviewed these fees and has found them to be reasonable and appropriate as a disciplinary measure under Rule 11.

And It Is So Ordered.

Clarence C. Newcomer
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-2269.

DAVID AND MARY KINEE, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF A CLASS OF BORROWERS SIMILARLY SITUATED, ET AL.

v.

ABRAHAM LINCOLN FEDERAL SAVINGS & LOAN ASSN., ET AL.

ORDER.

AND NOW, to wit, this 29th day of March, 1974, the motion of plaintiffs in the above captioned matter to vacate this Court's Order of March 5, 1974 is hereby DENIED.

AND IT IS SO ORDERED.

CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-2269.

OTHA H. AND GERTRUDE SAYRE, ET AL.

v.

ABRAHAM LINCOLN FEDERAL SAVINGS & LOAN ASSOCIATION, ET AL.

ORDER.

WHEREAS, the Court, by letters dated November 8 and November 9, 1973, invited certain defendants who had been voluntarily dismissed from the above captioned action to submit through their attorneys bills of costs for expenses incurred by them in having been forced improperly to appear and to defend in this suit; and

WHEREAS, counsel for these defendants were also asked to submit itemized bills of costs which included counsels' normal hourly rates in order to allow the Court to determine the reasonableness of these bills, it being stated that such submissions would remain, at the option of counsel, within the Court's confidence; and

WHEREAS, these counsel were also requested to submit affidavits to the effect that the bills submitted were true and correct; and

WHEREAS, several of these defendants have now requested the Court to make these submissions, upon which

the Court based in part its counsel fee Order of March 5, 1974, part of the official record of this case;

Now, therefore, this 25th day of April, 1974, it is hereby Ordered, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, that the official record of this case be modified to include the bills submitted to this Court, including those accompanied by counsels' hourly rates, the affidavits in support thereof, and copies of the Court's letters dated November 8 and 9, 1973. In order to protect the confidentiality of the bills submitted along with hourly rates, where such confidentiality has been requested, such documents shall be sealed, and are to be opened only upon the order of the Court of Appeals.

And It Is So Ordered.

Clarence C. Newcomer
Clarence C. Newcomer, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

July 5, 1974

No. 74-1458

DAVID and MARY KINEE, et al.,
Appellants,

v.

ABRAHAM LINCOLN FEDERAL SAVINGS & LOAN ASSN., et al.

(D. C. Civil No. 72-2269)

(See attached for complete caption)

Present: MARIS and ADAMS, ROSENN and HUNTER, *Circuit Judges.*

1. Motion by appellees, Thomas S. Hargesheimer & Son, Kissell Co., Littlewood Lloyd & Co., John M. Breen Co., Latimer & Buck, Inc., Republic Mortgage Co., Strouse Greenberg & Co., Nutter Mortgage Service, Central Kensington Building & Loan Assn., to dismiss appeal

2. Appellants' answer to appellees' motion to dismiss appeal

in the above listed for Thursday, July 18, 1974.

Respectfully,

T. F. QUINN,
Clerk

enc.
fm

The foregoing Motion to dismiss the appeal is granted. See United States v. Boccuto, 274 F. 2d 860 (3 Cir. 1959).

By the Court,

MAX ROSENN,
Judge

Dated: July 19, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 74-1458

DAVID and MARY KINEE, et al.,
Appellants,

v.

ABRAHAM LINCOLN FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* MARIS, VAN DUSEN, ALDISERT, GIBBONS, ROSENN, WEIS and GARTH, *Circuit Judges*

The petition filed by appellants and their attorneys, Freedman, Borowsky and Lorry, in their own right, for rehearing, or in the alternative, to permit counsel for appellants to intervene as parties in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MAX ROSENN,
Judge

Dated: August 12, 1974

FEDERAL RULES OF APPELLATE PROCEDURE.
RULE 3.

APPEAL AS OF RIGHT—HOW TAKEN.

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U. S. C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and in criminal cases, habeas corpus proceedings, or proceedings under 28 U. S. C. § 2255, the clerk shall mail a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

FEDERAL RULES OF CIVIL PROCEDURE.
RULE 11.

SIGNING OF PLEADINGS.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.